UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
v.	)	Criminal No. 00-63-B-S
	)	
TIMOTHY J. THERIAULT	)	
	)	
Defendant	)	

ORDER ON DEFENDANT'S MOTION FOR DISCOVERY (DOCKET NO. 8) AND PROPOSED FINDINGS OF FACT AND RECOMMENDED DECISION ON DEFENDANT'S MOTION TO SUPPRESS (DOCKET NO. 9)

On December 15, 2000, I conducted a hearing on the Defendant's Motion for Discovery (Docket No. 8) and Motion to Suppress Evidence (Docket No. 9). I now Order that the Motion for Discovery be dismissed as moot, the Government having provided certain items of discovery prior to hearing. Furthermore, since the Government conceded for purposes of this hearing that the Defendant had the standing necessary to challenge the search and seizure of the package in New Hampshire, the Defendant did not press other of his discovery requests. I also recommend that the Court **DENY** the Motion to Suppress and adopt the proposed findings of fact.

Proposed Findings of Fact

This case began in Manchester, New Hampshire on August 2, 2000, when Jay MacKenzie, Rockingham County Sheriff's Deputy, spotted a suspicious United Parcel Services ("UPS") package on the air freight conveyor belt at the Manchester airport. During the summer of 2000, MacKenzie was working with an air freight drug interdiction team on Wednesday and Thursday of

each week. MacKenzie's duties required him to stand by the conveyor belts as air cargo was transferred from one plane to another at the Manchester facility and scan the packages as they passed by him. MacKenzie had received training for this position at various law enforcement programs and had been taught to look for a number of different indicators when scanning packages.

This particular package attracted his attention at first because it was extremely heavily taped. The address label was handwritten. MacKenzie picked the package up and it was very solid with no sound of movement from within, suggesting to him that there may be a box within the box, a method of masking odor or contents. He also noted that the package's sender and recipient was "Smith", a common name which could have been an alias. "Happy B'day Stud" was written on the wrapping. The package originated in California, which MacKenzie identified by training as a "source state" for illicit drugs. The package had been shipped overnight mail. With no other factors to rely upon, MacKenzie removed the package from the conveyor belt and took it outside. He then prepared a line-up with six similarly "seized" packages.

MacKenzie's procedure in this case duplicated what he does repeatedly during his duty time at the airport. Once the line-up had been arranged, another officer brought his trained drug sniffing dog to the packages. The dog alerted on the package in issue, indicating the presence of narcotic substances.[1] Had the dog failed to alert on the package, the package would have proceeded on its way in due course, arriving in Bangor as scheduled. Approximately ten to fifteen minutes elapsed from the time MacKenzie first spotted the package until the dog sniffed it. The plane heading to Maine, the package's intended destination, had not left the ground and was not in any way delayed by this line up procedure.

[1] Defendant does not challenge the probable cause finding based upon the dog's alert. The New Hampshire authorities obtained and executed a search warrant for the package and discovered controlled substances. That finding, in turn, became the basis of the "anticipatory" search warrant for the premises at Lincoln Street in Bangor. Defendant does challenge the probable cause basis of later warrants, but not on the basis of the dog's alert.

MacKenzie conceded that certain suspicious factors were not present in this case. He acknowledged that he knew of no prior police intelligence regarding either the sender or the recipient or the city of either origination or destination. He also acknowledged that there was nothing suspicious about the size or weight of the package. He had no knowledge regarding any prepayment, another suspicious factor based upon his training. MacKenzie further agreed that he could detect no masking odor, such as cologne, that might be sprayed on a package of narcotics. However, based upon the training he had received, MacKenzie felt there were enough indicators to take the package off the conveyor belt. All packages removed from the belt do not necessarily result in dog alerts and packages are routinely returned to commerce after this brief interruption.

Once the New Hampshire authorities discovered a controlled substance in the package, they alerted authorities in Maine. Special Agent James Carr of the Maine Drug Enforcement Agency ("MDEA") applied for and obtained a search warrant for 21 Lincoln Street, Bangor, Maine, the package's destination. The premises to be searched consisted of the entire downstairs portion of a duplex dwelling, the upstairs being identified as 19 Lincoln Street. The state court judge specifically ordered that execution of the warrant was contingent upon the successful delivery of the package to the premises.

Mark Leonard, an agent with the MDEA, arranged for a controlled delivery of the package to the occupants of 21 Lincoln Street. Following successful delivery of the package, the search warrant was executed. Prior to executing the warrant the agents had no idea that the package might have been intended for 19 Lincoln Street, the upstairs portion of the duplex. However, Donald Smith, the occupant of 21 Lincoln Street, informed the agents that the intended recipient was Tim Theriault who owned the entire premises and lived in the upstairs unit. Smith stated that he had on at least one other occasion received a package intended for Theriault. Theriault told him that the

packages came to 21 Lincoln Street because Smith was home more frequently than he was. Smith said he believed the package contained motorcycle parts. He also told the officers that within the last month he had purchased marijuana from Theriault.

Acting upon the information provided by Smith, Agent Leonard requested that the Bangor Police Department's Tactical Team secure the upstairs unit while Special Agent Carr obtained a search warrant for the premises. Believing that at least one individual, a Paul Casey, was in the upstairs apartment, the Team went up the rear stairs from Smith's apartment to the upstairs unit and knocked on the interior door. Paul Casey opened the door. The Tactical Team moved through the residence, opening closets and looking under beds for anyone hiding from them. Once the Team, consisting of about four people, completed their sweep, they left the area. Agent Leonard and Agent Gould posted themselves inside the residence but near the entryways to await the securing of a search warrant. Paul Casey elected to remain at the apartment and at the conclusion of the Tactical Team's sweep, Theriault's girlfriend, Jennifer Haskell, also arrived at 19 Lincoln Street and elected to remain.

According to Haskell, when she entered the apartment she looked into Theriault's bedroom and observed that the room had already been searched, that drawers had been opened and clothing had been strewn about the room. I am not persuaded that the Tactical Team conducted a wholesale search of the premises as Haskell suggests. While it is conceivable that in their exuberance they may have tipped the mattress and sheets onto the floor and thrown some clothing from the closets, there is no reason to believe that they opened any closed containers. Their sole purpose was to search for human occupants and they appear to have limited themselves to that purpose. To the extent Haskell testified to the contrary, I do not find her testimony to be credible.

Special Agent Carr took about one and one-half hours to obtain the second search warrant. Once that warrant had been signed, the officers proceeded to conduct a comprehensive search of 19 Lincoln Street. They recovered a number of incriminating items, including firearms and additional items. One of the additional items was a Western Union money receipt that had been wired to California. Although the parties entered into a stipulation regarding Agent Arno's ongoing investigation of the connection, if any, between Theriault and the money wire receipt, that issue was not fully developed on this motion in light of the Government's agreement to concede for purposes of this hearing that Defendant had standing to challenge the search and seizure of the package.

Discussion

Defendant argues that the searches conducted in this case fail to pass constitutional muster in at least three important respects. First, Defendant maintains that the "seizure" of the package from the conveyor belt was not based upon sufficient reasonable suspicion and under First Circuit precedent must be suppressed. According to Defendant, the subsequent searches at 19 and 21 Lincoln Street are also invalid because probable cause stems from the package's contents. Next, Defendant argues that the affidavit prepared for the search warrant for 19 Lincoln Street does not contain sufficient information within its four corners to support a finding of probable cause. Finally, Defendant maintains that the police improperly searched 19 Lincoln Street during the initial tactical sweep, rendering any subsequent search pursuant to an otherwise valid warrant unconstitutional.

1. Removal of the package from the conveyor belt

Defendant's argument regarding the "seizure" of the package is narrowly focused. He concedes, as he must, that the dog's alert on the package gave rise to probable cause which

justified the issuance of the search warrant in New Hampshire. *See United States v. Allen*, 990 F.2d 667, 671 n.1 (1st Cir. 1993). He also agrees with the Government that the police detention did not unreasonably delay the delivery of the package beyond the contractual expectations of the parties. *See United States v. LaFrance*, 879 F.2d 1, 7 (1st Cir. 1989). Theriault's sole contention is that MacKenzie did not have a reasonable, articulable suspicion which justified his initial removal of the package from the conveyor belt for the purpose of the package line-up. He bases his argument that MacKenzie needed something more than a "hunch" to remove the package from the conveyor belt on *Allen*. In that case the Court noted that "the district court found that the inspector had reasonable suspicion to detain the package initially." *Allen*, 990 F.2d at 671. From this language Theriault concludes that the mere removal of his package, and presumably the five other packages similarly aligned for the "dog sniff" test, amounted to a seizure for Fourth Amendment purposes and had to be based upon a reasonable, articulable suspicion. The argument fails in two respects: first, because under Fourth Amendment analysis the officer acted properly, and second, because in all probability the Fourth Amendment is not applicable to these facts in any event.

Just as in *Allen*, the officer has articulated sufficient facts causing him to grow suspicious of the package. While MacKenzie did not have particularized knowledge about the addressee of this package as was the case in *Allen*, he did note that the package was taped heavily and originated in a "source state" for unlawful drugs. He also noted the handwriting on the package and the use of the common alias "Smith" for both the addressee and the sender. While these facts might all have been innocent enough, individually, their cumulative effect was sufficient to give the officer a reasonable suspicion significant enough to justify the additional ten minutes that were required for the packages to be lined up and the dog to be brought to them.

Assuming that the "seizure" or brief detention of the package does implicate Fourth Amendment concerns, "reasonableness remains the focus of judicial inquiry" and "[w]e must ask whether the detention, taken as a whole, or any step therein, was unreasonable." *LaFrance*, 879 F.2d at 6. In my view, the infringement upon Defendant's possessory interest in the package, if any at all, was so *de minimis* as to be inconsequential. There was absolutely nothing intrusive about this brief detention and presumably the owners of the other five packages were never even aware that their packages had been removed from a conveyor belt for the purpose of a "dog sniff." Any person placing a package in commerce with a common carrier for transcontinental delivery reasonably expects that many people will handle the package and remove it from conveyor belts at various locations. Indeed, that is why packages are heavily taped and sometimes double boxed to prevent detection of their contents. In other words, the insubstantial intrusion into Theriault's privacy expectations presented by these facts was eminently reasonable when weighed against the Government's interest in "detecting those who would traffic in deadly drugs for personal profit." *United States v. Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring); *see also United States v. Place*, 462 U.S. 696, 703 (1983).

In sum, when a traditional Fourth Amendment analysis is applied to these facts, it becomes clear that the officer had an articulable suspicion that justified the removal of the package from the conveyor belt and that the brief detention of the package in a "line up" was a limited intrusion reasonably tailored to the circumstances presented to Deputy MacKenzie.

However, I question whether the Court must engage in this Fourth Amendment analysis on these facts. The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. A sniff by a dog does not amount to a "search" within the meaning of the Fourth Amendment. *See*

Place, 462 U.S. at 706-07. Under the same Fourth Amendment jurisprudence, a "seizure," as opposed to a "search," of property occurs where there is some meaningful interference with an individual's possessory interests in the property. *See United States v. Jacobsen*, 466 U.S. 109, 113 (1984). A number of courts have recognized that a brief detention and removal of luggage from one location to a nearby location in order to give a dog the opportunity to sniff does not amount to a seizure. *See, e.g., United States v. Gant*, 112 F.3d 239, 241 (6th Cir. 1997) (affirming district court's conclusion that "moving defendant's bag from the overhead compartment to the seat did not constitute a seizure, because its removal caused no meaningful interference with defendant's possessory interest in the bag."); *United States v. Harvey*, 961 F.2d 1361, 1363-64 (8th Cir. 1992) (finding no seizure when appellants' baggage "was moved from one public area, the overhead baggage area, to another, the aisle," in order to facilitate a canine search); *United States v. Lovell*, 849 F.2d 910, 916 (5th Cir. 1988) (holding that no seizure occurred when DEA agents removed bags from conveyor belt once those bags had been surrendered to a third-party common carrier).[2] Even *Allen*, the case upon which Defendant relies for the proposition that there must be a reasonable suspicion before the package can be singled out for a dog sniff, actually speaks in terms of "reasonable suspicion support[ing] the package's *delayed delivery*." *Allen*, 990 F.2d at 672 (emphasis added). The infringement of a possessory interest in a package shipped through a common carrier that triggers a "seizure" of the package occurs when delivery is delayed. *See LaFrance*, 879 F.2d at 7. The "delay" prior to the dog sniff has no constitutional significance; the delay subsequent to the dog sniff is not subject to challenge on this record.

2. Affidavit in support of the search warrant for 19 Lincoln Street

[2] The agents' conduct in *Lovell* apparently subsequently involved squeezing the bag. Under current law that conduct might have amounted to a search of the bag. *See Bond v. United States*, 120 S. Ct. 1462, 1465 (2000) (holding that agent's physical manipulation of petitioner's bag "in an exploratory manner" violated the Fourth Amendment). However, that sort of search is not

The affidavit in support of the search warrant for Theriault's residence provided a substantial basis for the reviewing judge to find probable cause to search that residence. Agent Carr's affidavit incorporated much of the information which had been used to obtain the anticipatory warrant to search 21 Lincoln Street, the downstairs apartment. That information included the New Hampshire search of the package which had led to the discovery of 8 to 10 ounces of methamphetamine. Additionally, the affidavit contained other information which the officers learned during their search of 21 Lincoln Street and conversations with its occupant, Donald Smith. Specifically, the issuing magistrate was informed that Donald Smith, the addressee on the suspect package, told the officers that the package was intended for Tim Theriault, his landlord and upstairs neighbor at 19 Lincoln Street. Smith also told the officers that he had signed for at least one other package on behalf of Theriault. Smith also stated that he had purchased ounce quantities of marijuana from Theriault on three or four occasions, the last time being less than one month prior to August 2nd, the date of the warrant's execution. Finally, the officer noted in his affidavit that Smith said Paul Casey had been staying in the upstairs apartment since the evening of August 1st. Paul Casey was known to Agent Carr as an individual on federal parole after serving a sentence for methamphetamine charges. The issuing magistrate was also informed that the residence at 19 Lincoln Street had been secured pending the issuance of the search warrant.

Applying the totality of the circumstances test set forth in *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983), this affidavit sets forth sufficient facts to establish probable cause. Although the warrant for 21 Lincoln Street was a conditional warrant subject to the limitations set forth in

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in any way implicated by the facts of this case. The portion of *Lovell* which concludes that the mere removal of bags from a conveyor belt is not a "seizure" is not implicated by *Bond*.

United States v. Vigneau, 187 F.3d 70, 79-80 (1st Cir. 1999),[3] there was nothing "conditional" about the probable cause giving rise to the search of 19 Lincoln Street or the warrant authorizing *that* search. Smith provided the necessary evidentiary link to give rise to the probable cause inference that Theriault was dealing drugs from the premises at 19 Lincoln Street. Although Smith's credibility may be subject to attack, the police and the issuing magistrate were permitted to rely upon his information in preparing and issuing this affidavit and search warrant. There were sufficient indicia of reliability, including his own statements against interest implicating himself in the purchase of unlawful drugs from Theriault.

3. The scope of the tactical sweep

Segura v. United States stands for the proposition that police may secure a residence while a search warrant is being obtained. 468 U.S. 796, 810 (1984) (holding "that securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents"). In this case, once the police developed probable cause based upon their conversation with Smith, they had no choice but to secure the upstairs apartment. Given that at least one known drug offender was located in the apartment, the security sweep to insure there were no other occupants hiding anywhere was appropriate. Defendant does not seriously challenge the reasonableness of those precepts.

Instead, Defendant argues as a factual matter that the police sweep exceeded the bounds of reasonableness and became an unlawful search for evidence. Unfortunately for Defendant, I do not find any evidentiary basis for his assertion. Agent Leonard testified that the tactical team officers

[3] The Government does not concede that Theriault has standing to challenge the search of 21 Lincoln Street. In any event, even if Smith's statements had been obtained through a violation of Smith's constitutional rights, which they were not, Theriault would have no basis to complain that any right of privacy of his person or premises had been violated. *Cf. Wong Sun v. United States*, 371 U.S. 471, 485-86 & 492 (1963).

were in the dwelling for a very brief period and only searched for persons who might be hiding. Agent Gould and he remained in the apartment with Casey and Haskell who both chose to remain at the scene. No one asserts that Leonard and Gould did anything improper during the 1½ to 2-hour time period while they waited for the warrant to arrive. Therefore, there is no basis to suppress the items seized from 21 Lincoln Street.

Conclusion

Based upon the foregoing, I now recommend that the Court adopt the proposed findings of fact and **DENY** the Motion to Suppress. I also **DISMISS**, as moot, the pending Motion for Discovery.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1993) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated: January 5, 2001

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Margaret J. Kravchuk
U.S. Magistrate Judge

U.S. District Court
District of Maine (Bangor)

CRIMINAL DOCKET FOR CASE #: 00-CR-63-ALL

USA v. THERIAULT Filed: 09/07/00

Other Dkt # 1:00-m -00044

Case Assigned to: Judge GEORGE Z. SINGAL

TIMOTHY J THERIAULT (1)
defendant

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Pending Counts:	Disposition
21:841B=ND.F NARCOTICS - SELL, DISTRIBUTE, OR DISPENSE COCAINE (1s)	
21:844A=MP.F MARIJUANA - POSSESSION (2s)	
21:844A=NP.M NARCOTICS - POSSESSION OF PROPOXYPHENE (3s)	
21:844A=CP.M CONTROLLED SUBSTANCE - POSSESSION OF METHYLENEDIOXYMETHAMPHETAMINE (4s)	

Offense Level (opening): 4

Terminated Counts:	Disposition
21:841A=ND.F NARCOTICS - SELL, DISTRIBUTE, OR DISPENSE (POSSESSION WITH INTENT TO DISTRIBUTE COCAINE 21:841a1b1C and 18:2) (1)	

Offense Level (disposition): 4

Complaints	Disposition
Ct. I - Conspiracy to possess with intent to distribute and distribute methamphetamine; Ct. 2 - Possession with intent to distribute cocaine [1:00-m -44]	

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